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Nos. 82-585 and 82-586

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALOHA AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

HAWAIIAN AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-585

ALOHA AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

82-586

HAWAIIAN AIRLINES, INC., APPELLANT

v.

DIRECTOR OF TAXATION, STATE OF HAWAII

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE UNITED STATES

This case presents the question whether the tax imposed by the State of Hawaii on the "gross income" of commercial airlines derived "from the airline business" violates the Federal Aviation Act of 1958, 49 U.S.C. 1513(a), as amended by Section 532 of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 701, which prohibits state taxes "on the sale of air transportation or on the gross receipts derived therefrom." The United States has an interest in the outcome of this case because, in our view, the

Hawaii tax is a flagrant violation of federal law, and if it is sustained the prohibition contained in Section 1513(a) will be rendered ineffective. As we will explain in greater detail, Section 1513(a) was enacted as part of the federal Airport Development Aid Program, under which federal assistance is provided to states and localities for airport improvements. This assistance is drawn from the Airport and Airway Trust Fund, which is in turn replenished by certain federal aviation taxes. Congress enacted Section 1513(a) to prevent excessive taxation of airlines and thus safeguard both the Airport Development Aid Program and the nation's system of civil aviation. Promoting air commerce and the development of an efficient air transportation system have long been important federal objectives (see 49 U.S.C. (Supp. IV) 1302, 1303 and 49 U.S.C. 1346). The Hawaii tax at issue here threatens these goals by imposing a prohibited tax on airlines at a time of general financial distress in the airline industry.

STATUTES INVOLVED

49 U.S.C. 1513, as amended by Section 532 of the Airport and Airway Improvement Act of 1982,[1] Pub. L. No. 97-248, 96 Stat. 701 provides in pertinent part:

> (a) No State * * * shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom * * *.
>
> (b) * * * Nothing in this section shall prohibit a State * * * from the levy or collection of taxes other than those ennumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services * * *.

[1] This Act is Title V of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324.

This provision is set forth in its entirety in a statutory addendum to this brief.

Section 239-6 of the Hawaii Rev. Stat. (repl. 1976) provides in pertinent part:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a special rate schedule for students * * * the tax shall be three per cent * * *. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [comprising the General Excise Tax law of Hawaii] but is not in lieu of any other tax.

STATEMENT

Appellants are commercial airlines that transport passengers, freight, and mail among several islands in the State of Hawaii but not to any airports outside Hawaii. However, the majority of appellants' passengers begin or end their travel outside Hawaii (82-585 J.S. 3; 82-586 J.S. 3), and the routes of appellants' inter-island flights cross international waters (82-585 J.S. 3, 7; J.S. App. 3, 21;[2] 82-586 J.S. 3-4; 82-586 J.S. App. A-29). Such routes unquestionably bring appellants within the coverage of the Federal Aviation Act of 1958.[3] See *Island Airlines, Inc.* v. *CAB*, 352 F.2d 735 (9th Cir. 1965).

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[2] "J.S. App." refers to the appendix to the jurisdictional statement in No. 82-585).

[3] The Federal Aviation Act of 1958 applies to all "interstate" or "overseas air transportation" and all "interstate" or "overseas air commerce." Sections 101(4), (10), (23)-(24) and 105(b)(2), 49 U.S.C. 1301(4), (10), (23)-(24), and 49 U.S.C. (Supp. IV) 1305(b)(2). See also 82-585 J.S. 7 n.2; 82-586 J.S. 11 n.11.

State taxes "on the sale of air transportation or on the gross receipts derived therefrom" were expressly forbidden by Congress when it enacted 49 U.S.C. 1513 in 1973. Nonetheless, Hawaii's State Director of Taxation continued to assess appellants for the state public service company tax set forth in Hawaii Rev. Stat. § 239-6 (repl. 1976), which has been in effect since 1963. This tax is set at a 3% or 4% of a company's "gross income each year from the airline business."[4] The taxes collected from appellant Aloha Airlines between 1974 and 1977 were approximately $4.2 million (82-585 J.S. 3 n.1); those assessed against appellant Hawaiian Airlines between 1974 and 1979 amounted to $8.89 million (82-586 J.S. App. A-29).

Claiming that the state tax was forbidden by 49 U.S.C. 1513, both appellants protested the assessments and sought refunds. However, the State Director of Taxation rejected appellants' claims, and his decisions were affirmed by the Tax Appeal Court of Hawaii (J.S. App. 4, 25; 82-586 J.S. App. A-33).[5]

Separate appeals by the airlines were consolidated in the Supreme Court of Hawaii. The United States filed a brief as amicus curiae supporting the airlines' contention that the Hawaii tax violated Section 1513 and was therefore invalid under the Supremacy Clause.[6]

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[4] Both appellants are taxed at 3% of their gross income (82-585 J.S. 7 n.2; 82-586 J.S. 4 n.4; A-32.

[5] The Tax Appeal Court also held that appellant Hawaiian Airlines was barred by the three-year state statute of limitations from contesting the assessments for 1974 and 1975, two of the six tax years at issue (82-586 J.S. A-32). The Hawaii Supreme Court did not expressly rely on these grounds for affirmance. In this Court, Hawaiian does not directly address this issue. See *Orr* v. *Orr*, 440 U.S. 268, 274 (1979).

[6] Aloha Airlines additionally contended that the state tax was an undue burden on commerce and thus violated the Commerce Clause. The Hawaii Supreme Court rejected Aloha's contention (J.S. App. 9-11), and Aloha has not raised that issue before this Court.

The Supreme Court of Hawaii affirmed the decisions of the Tax Appeal Court. Stating that appellants' and the government's interpretation of Section 1513(a) would result in "federal preemption of the entire field of commercial aviation taxes," the court reasoned (J.S. App. 9) that the exceptions contained in Section 1513(b) limited "so broad a preemptive sweep" by permitting the continued enforcement of state "property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services." The court then purported "to harmonize the seeming contradictions consistently with the purpose of the federal legislation" J.S. App. 9. After examining the legislative history of Section 1513 (J.S. App. 6-9 & n.7), the court identified the congressional purpose as one of insulating from state taxation only the "primary sources" of federal aviation revenues (J.S. App. 15). These "primary" revenue sources, the court stated, were the federal ticket taxes on air passengers and shippers. Since the Hawaii tax was levied upon "public service companies rather than the users of their services" (J.S. App. 16), the court concluded that the Hawaii tax did not "invade" the "area" covered by these federal taxes (J.S. App. 17). Thus, the court asserted, "[t]he object sought by the federal law therefore reveals nothing that would preclude the subjection of Aloha and Hawaiian to" the state tax (J.S. App. 16).

Without flatly declaring that the state tax was a property tax permitted by 49 U.S.C. 1513(b), the court noted that the tax "has some attributes of a property tax," and the court stated that it did not "quarrel with" the Hawaii legislature's characterization of the tax as "'a means of taxing the personal property of the airline * * *'" (J.S. App. 16)[7]

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[7] By contrast, the Hawaii Tax Appeal Court held squarely that the state tax "is a property tax" that 49 U.S.C. 1513(b) "expressly" permits (J.S. App. 23; 82-586 J.S. App. A-32).

In dissent, Justice Marumoto stated that the "plain meaning" of Section 1513(a) prohibited collection of the state tax, "which is based on the gross income of the airlines involved in the instant cases" (J.S. App. 18). "[M]ere characterization" of the tax as a personal property tax, he stated, did not change its "essential nature as a tax 'on the sale of air transportation or on the gross receipts derived therefrom'" *(ibid.)*. Justice Marumoto further observed that Hawaii "has no personal property tax as such" and had none at the time the challenged state tax statute was enacted in 1963 (*ibid.*; J.S. App. 5).

ARGUMENT

The Supreme Court of Hawaii upheld that state's tax on "gross income *** from the airline business" despite the explicit ban in 49 U.S.C. 1513(a) against any state tax "on * * * gross receipts derived" from air transportation. The court did not question the constitutionality of this federal statute, and we know of no plausible grounds for doing so.[8] Instead, ignoring the plain terms of the congressional enactment, the court relied upon what it erroneously viewed as the underlying purpose of the federal statute. The precedent set by that court's decision threatens the fiscal integrity of the federal Airport Development Aid Program (ADAP), which Congress established in 1970, strengthened throughout the 1970's, and renewed in 1982. As appellant Hawaiian Airlines contends (82-586 J.S. 20), the decision below warrants summary reversal.

1. In 1970, Congress enacted two statutes that together established the Airport Development Aid

[8] No party below contended that Section 1513 exceeded the constitutional powers of Congress, and in our view the constitutionality of that provision is beyond dispute. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141, 150 (1979).

Program (ADAP), "a comprehensive program to expand and improve the national airport and airway system over the decade beginning July 1, 1970." *Massachusetts* v. *United States*, 435 U.S. 444, 447 (1978). In the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219,[9] Congress provided for vastly increased federal expenditures for expansion of local airports and federal navigation services. Federal financial assistance to states and localities was to come from the newly created Airport and Airway Trust Fund in the Treasury. To supply and replenish this Trust Fund, new or increased federal taxes on users of civil aviation were enacted by the Airport and Airway Revenue Act of 1970, Pub. L. 91-258, 84 Stat. 236. Of those federal taxes, three were designed to provide "commercial aviation's share of the cost of federal activities." *Massachusetts* v. *United States*, *supra*, 435 U.S. at 451. These consisted of an 8% tax on the price of domestic passenger tickets, a $3 head tax on international travelers emplaning in the United States, and a 5% tax on the cost of air freight (*ibid.*; J.S. App. 7 n.7).[10]

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[9] Sections 2-30 of this Act, as amended, 49 U.S.C. (& Supp. IV) 1702-1730, and as further amended by Section 1102 of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 623, were repealed on September 3, 1982. The repealing and superseding legislation is explained, *infra*, at pages 9-10.

[10] These three taxes are found in the Internal Revenue Code of 1954, 26 U.S.C. (& Supp. IV) 4261, 4271, as amended by Sections 203-204 of the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 238. These taxes, which were originally set to expire on June 30, 1980, were extended to September 30, 1980, by Pub. L. No. 96-298, Section 1(b), 94 Stat. 829. Section 280(a)-(b) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 564, they were reinstated as of August 31, 1982, and are now set to expire on January 1, 1988.

After ADAP took effect, this Court held in *Evansville Airport* v. *Delta Airlines*, 405 U.S. 707 (1972), that the Commerce Clause was not violated by $1 state "head charges" that were levied upon emplaning airline passengers and were earmarked under state law for the improvement of aviation facilities. This Court also stated that "[n]o federal statute or specific congressional action or declaration evidences a congressional purpose to deny or pre-empt state and local power to levy charges designed to help defray the costs of airport construction and maintenance." 405 U.S. at 721.[11]

Misgivings concerning the possible effect of this decision were expressed by Congress. A Senate report, for example, stated that *Evansville Airport* presaged an "inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year." S. Rep. No. 93-12, 93d Cong., 1st Sess. 17 (1973); see also H.R. Rep. No. 93-157, 93d Cong., 1st Sess. 5, 10 (1973); H.R. Rep. No. 93-225, 93d Cong., 1st Sess. 5-6 (1973).

In response to the *Evansville Airport* decision, Congress enacted Section 1513. Speaking in support of Section 1513, Senator Cannon stated that the state aviation taxes prohibited by that provision, if not outlawed, would disrupt ADAP's fiscal structure (119 Cong. Rec. 3349 (1973). When coupled with the federal taxes already in effect, he observed (*ibid.*), the state taxes resulted in a "form of double taxation which we did not intend when, in 1970 we enacted a national system of aviation user taxation." He characterized the 1973 Air-

[11] The Court was aware of ADAP and the 1970 Airport and Airway Development Act and relied on Section 18 of that Act, 49 U.S.C. 1718(a)(8), in support of its holding against federal preemption. See *Evansville Airport* v. *Delta Airlines* 405 U.S. 707, 721 (1972).

port Development Acceleration Act[12] "as an aviation development package, the components of which cannot be separated" (119 Cong. Rec. 3349 (1973)). Thus, he concluded (*ibid.*), if "local taxes on passengers and air carriers are allowed to proliferate nationally, and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a Federal airport development program" (*ibid.*).

Throughout the 1970s, Congress strengthened and expanded the federal role in ADAP. ADAP was originally set to expire in 1980,[13] but less than three months ago Congress reinstated that program in revised form and provided for its continuation until the end of fiscal year 1987. See Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, Sections 501-532, 96 Stat. 671-702. Under this new enactment, the percentage of federal financial assistance to states and localities has not been reduced and has, in some respects, been increased. See note 12 below. Congress has also reinstated and continued the Airport and Airway Trust

[12] The federal percentage share provided for ADAP project costs is set forth in Section 17 of the Airport and Airway Development Act of 1970, 49 U.S.C. (& Supp. IV) 1717.

Section 5 of the 1973 amendatory Act, Airport Development Acceleration Act of 1973, Pub. L. No. 83-44, 87 Stat. 89, increased the federal share to 75% of ADAP project costs for those airports emplaning less than 1% of all commercial airline passengers each year. The previous limit was 50% for all airports (see H.R. Rep. No. 93-157 93d Cong., 1st Sess. 9 (1973)).

Later amendments eventually raised the federal share to 75% for all airports and to 90% for those airports emplaning less than 1% of all passengers each year. See Airport and Airway Development Act Amendments of 1976, Pub. L. No. 94-353, Section 9(a), 90 Stat. 877; Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, Section 203, 94 Stat. 55. See also 11 FAA, U.S. Dep't of Transp., *Ann. Rep. of Operations under the Airport and Airway Development Act* 13 (Fiscal Year 1980) [hereinafter "1980 FAA Report"].

[13] 1980 FAA Report at 13.

Fund, the fiscal entity responsible for ADAP financing (Section 281, 96 Stat. 565). And Congress has prolonged the federal taxes on airline passenger tickets, international passengers, and freight shipments (Section 280(a)-(b), 96 Stat. 564). Thus, the same fiscal imperatives that originally led Congress to enact Section 1513 remain today. Indeed, Congress recently amended Section 1513 in order to restrict further the permissible scope of state property taxation (Section 532, 96 Stat. 701).[14]

State court decisions such as the present one, unless corrected, will progressively undermine the federal fiscal structure for the funding of civil aviation facilities. The problem posed is neither isolated nor hypothetical. At least five other states have enacted taxes on annual

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[14] The 1982 amendment to 49 U.S.C. 1513 forbids states from assessing airline transportation property at values proportionately higher to true market value than assessed valuations of other commercial and industrial property. It likewise forbids higher ad valorem tax rates. Hawaii has no ad valorem personal property tax either for airlines or other businesses (J.S. App. 18).

Although the 1982 amendment permits taxation of other transactions "in lieu" of ad valorem taxes, this is only on the condition that such tax revenues are "wholly utilized for airport and aeronautical purposes." Here, Hawaii's tax on airline gross income goes to the general fund of the state treasury. Aloha and the State stipulated below that the state's airport financing is derived from airport use charges and rentals independently of any tax, and that between 1974 and 1977 Aloha paid annual use charges to the State ranging from $201,000 to $518,000 (Record on Appeal to Hawaii Supreme Court at 30-31).

airline gross receipts.[15] Appellants note that two cases involving issues similar to this one are pending in an Alaska state court (82-585 J.S. 16; 82-586 J.S. 9 n.9).[16] See also *Air Transportation Association* v. *New York Department of Taxation & Finance*, No. 153 (N.Y. Sup. Ct. June 10, 1982) The recurrent risk of state gross receipts taxation on commercial airlines, therefore, cannot be put to rest until this Court acts to enforce the congressional prohibitions.

The interest of the United States in the outcome of this case is underscored by statutory directives Congress has given to the Secretary of Transportation regarding civil aviation. Section 305 of the Federal Aviation Act of 1958, 49 U.S.C. 1346, requires the Secre-

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[15] Among the states that tax annual gross receipts or gross income without expressly exempting airline gross receipts are:

State	*Tax Rate*	*State Statute*
Delaware	0.4% (of quarterly gross receipts over $1,000)	Del. Code Ann. tit. 30, § 2301(d)-(e) (Cum. Supp. 1980)
Indiana	1.3% (for 1982)	Ind. Code Ann. § 6-2.1-2-3(b) (Burns Supp. 1982)
Maryland	2.5%	Md. Tax & Rev. Code Ann. § 130(a)(1)(1980)
Washington	1.8%	Wash. Rev. Code Ann., §§ 82.16.010(11), 82.16.020(5) (1981 & Cum. Supp. 1982)
West Virginia	3.3%	W. Va. Code § 11-12A-2 (repl. Cum. Supp. 1981)

[16] Decisions of three other state courts have stricken down state taxes on airline gross receipts similar to the tax at issue here. See *State* v. *Cochise Airlines*, 626 P. 2d 596, 600-601 (Ariz. Ct. App. 1981); *Air Transportation Association* v. *New York State Department of Taxation & Finance*, No. 153 (N.Y. Sup. Ct. June 10, 1982); *Allegheny Airlines, Inc.* v. *City of Philadelphia*, 453 Pa. 181, 186, 309 A.2d 157, 159 (1973).

tary to "encourage and foster the development of civil aeronautics and air commerce in the United States and abroad." Section 103(a) of the Act, 49 U.S.C. (& Supp. IV) 1303(a), requires him to consider "as being in the public interest * * * the regulation of air commerce in such manner as to best promote its development and safety * * *." In Section 502(a)(5) of the Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, 96 Stat. 671, Congress recently directed "all airport and airway programs * * * [to] be administered" in furtherance of this objective. Plainly these goals cannot be met so long as state taxes like Hawaii's continue to be collected. Under Hawaii law, the tax on airline gross income falls due whether the airline realizes profit or loss during the taxing period.[17] Obviously, the federal interest will be frustrated if, year after year, forbidden taxes on gross receipts continue to erode the retained earnings, or ultimately the capital reserves of airlines, while they or their customers are at the same time obligated to provide federal revenues to fund ADAP projects throughout the Nation, including those in Hawaii.[18]

2.The court below disregarded the unambiguous meaning of Section 1513(a), which forbids all state taxes "on the sale of air transportation or on the gross receipts derived therefrom." Because Section 1513(b) lists other permissible state taxes, the court characterized

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[17] Losses are expected for most airlines during 1982's fourth quarter, and the entire period "could be the worst ever for the industry." Byrne, *The Outlook for Airlines Gets Bleaker*, Wall St. J., Oct. 27, 1982, at 35, col. 3.

[18] Between 1971 and September 30, 1980, 22 air-carrier-related ADAP projects were completed in Hawaii aided by $40.154 million of federal funds; seven such projects were then underway in Hawaii aided by an additional $20.853 million of federal funds. During the same period, one general-aviation-related ADAP project had been completed in Hawaii at a cost in federal-aid funds of an additional $274,112. See 1980 FAA Report, *supra*, at 113, 115.

the absolute prohibitions contained in Section 1513(a) as "paradoxical" (J.S. App. 14). The court therefore consulted the legislative history and concluded that Congress did not intend to prohibit taxes such as that at issue here (J.S. App. 15-16). Every step of this reasoning is unsupportable.

First, there is no contradiction, ambiguity, or "paradox" in the statutory scheme. Section 1513(a) does not prohibit all state taxes on covered airlines but only those taxes, fees, head charges or other charges levied "directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." As Section 1513(b) makes clear, other state taxes, including those listed in that provision, are not forbidden. The Hawaii Supreme Court's suggestion that Sections 1513(a) and 1513(b) are somehow inconsistent is plainly incorrect, since the taxes permissible under Section 1513(b) are limited solely to "taxes other than those enumerated in subsection (a)."

Second, the legislative history of Section 1513 does not reveal any congressional intent to restrict the express prohibition against state gross-receipts taxes on air-transport proceeds. The court below assumed that the purpose of Section 1513 was limited to the elimination of state head taxes on airline passengers and users of aviation services (J.S. App. 8 & n.9, 15). While the invalidation of such passenger taxes was one congressional objective described at considerable length, it was by no means the exclusive objective, and the court below cited nothing from legislative history in support of its conclusion that, although taxes on "users of * * * [airline] services" were to be federally proscribed, gross-receipts taxes on airlines were not (J.S. App. 16).

Indeed, the legislative history evidences a congressional purpose to proscribe *both* types of taxes, wheth-

er borne by the airlines or by their customers. The House Subcommittee was specifically made aware of the problems produced by gross-receipts taxes during 1973 hearings when Ohio's deputy tax commissioner described that State's 4% excise tax based on apportioned gross receipts from airline shippers and passengers.[19] To save Ohio's tax, the commissioner requested that the list of permissible state taxes in what is now Section 1513(b) be expanded to include state "privilege or excise taxes" and "state gross receipts taxes fairly apportioned to a State."[20] The House Subcommittee, perhaps persuaded by the objections of the Air Transport Association of America,[21] declined the invitation. It reported out Section 1513 without making any revision to accomodate taxes like Ohio's or Hawaii's (H.R. Rep. No. 93-157, *supra*, at 16). Section 1513 was subsequently enacted in a form virtually identical to the subcommittee bill. Thus, Congress considered a state taxing scheme similar to Hawaii's and deliberately chose not to modify the prohibitions against it.[22]

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[19] *Airport Development Acceleration Act of 1973: Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R 4182 and S.38 (and all similar bills) Before House Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 246-253 (1973) (hereinafter "*Hearings*").

[20] *Hearings*, *supra*, at 249. In Hawaii, all airline gross income is subject to the 3% or 4% tax. Hawaii has no formula for apportioning taxable gross income to correspond to those segments of appellants' flights crossing State, rather than international, airspace (82-586 J.S. 11 n.11). Thus, even if Ohio's proffered amendment had become law, Hawaii would presumably be in breach of its apportionment requirement.

[21] *Hearings*, *supra*, at 96-101.

[22] The Senate Committee Report (S. Rep. No. 93-12, *supra*, at 17) did not even insinuate that any limitation was intended on Section 1513(a)'s prohibition of state gross-receipts taxes. Similarly, during floor debate Senator Cannon stated (119 Cong. Rec. 3349

The court below also suggested that Hawaii's tax "has some attributes of a [personal] property tax" (J.S. App. 16), apparently because the Hawaii legislature characterized it as such (*ibid.*).[23] The court did not explicitly hold that the tax was a "property tax[]" within the meaning of 49 U.S.C. 1513(b), and therefore, its statement would seem to lack any significance under federal law. Assuming, however, that the court intended to hold that the tax was saved by Section 1513(b), such a holding is unsupportable. As previously noted, Section 1513(b) permits only those "property taxes" not otherwise prohibited by 1513(a). Regardless of how Hawaii labels its tax, its true nature must be tested by reference to 1513(a)'s prohibitory scope and must be resolved as a matter of federal, not state, law. *Chase Manhattan Bank* v. *Finance Administration*, 440 U.S. 447, 449 (1979); *Diamond National* v. *State Equalization Board*, 425 U.S. 268 (1976); *First National Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, 347 (1968). Once this is done, it is indisputable that Hawaii's public service company tax, when viewed in terms of its tax base and its economic incidence, can be

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(1973); emphasis added): "The bill prohibits the levying of State or local head taxes, fees, *gross receipts taxes or other such charges either on passengers or on the carriage of such passengers in interstate commerce.*"

[23] Even if the legislature's characterization is accepted at face value, other parts of Hawaii's tax statutes reflect the legislature's inconsistency on this point. As dissenting Justice Marumoto observed below, the State has no personal property tax as such (J.S. App. 18). And, by operation of the very terms of Hawaii Rev. Stat. § 239-6 (repl. 1976), the payment of the State's public service company tax on gross income is in lieu of only one other State tax. That tax is levied under Hawaii's General Excise Tax Law, Hawaii Rev. Stat. § 237 (repl. 1976), and is set at 4% of the annual gross income of a "service business." See § 237-13(6). Thus, the airlines' payment of one gross-receipts tax is only in lieu of another gross-receipts tax.

nothing other than a gross-receipts tax forbidden by 1513(a). This Court had not hesitated to invalidate state taxes in cases where the preemptive congressional prohibition was either less explicit or couched in more conditional terms. E.g., *Maryland* v. *Louisiana*, 451 U.S. 725, 747-752 (1981); *Arizona Public Service Co.* v. *Snead*, *supra*, 441 U.S. at 146-151. A fortiori the same result should obtain here.

CONCLUSION

The judgment of the Supreme Court of Hawaii should be reversed.

Respectfully submitted.

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APPENDIX

FEDERAL STATUTES INVOLVED

Section 1113, by Section 7(a) of the Airport Development Acceleration Act of 1973, Pub.L. No. 93-44, June 18, 1973, 87 Stat. 90, as added to the Federal Aviation Act of 1958 49 U.S.C. 1513, and as amended by Section 532 of the Airport and Airway Improvement Act of 1982, Pub.L. No. 97-248, 96 Stat. 701 states:[24]

Prohibition exemption.

SECTION 1113(a) No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

[24] The additions made by the 1982 amendatory Act are in italics.

Permissible State taxes and fees.

(b) *Except as provided in subsection (d) of this section*, nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nonapplicability.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply such authority until December 31, 1973.

(d)(1) ***The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting***

for a State or subdivision of a State may not do any of them:

(A) *assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;*

(B) *levy or collect a tax on an assessment that may not be made under subparagraph (A) of this paragraph; or*

(C) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(2) *In this subsection—*

(A) *"assessment" means valuation for a property tax levied by a taxing district;*

(B) *"assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;*

(C) *"air carrier transportation property" means property as defined by the Civil Aeronautics Board, owned or used by an air carrier providing air transportation;*

(D) *"commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy; and*

(E) *"State" shall include the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States, and political agencies of two or more States.*

(3) *This subsection shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes.*